General Laborers Union, Local 317; Bricklayers and Allied Craftsmen, Local 19 of Wisconsin *and* Grazzini Brothers & Company and Tile, Marble, Terrazzo Finishers and Shopworkers, Local 47-T. Case 18–CD–313

July 15, 1992

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed February 28, 1991,[1] by the Employer alleging that the Respondents, Bricklayers Local 19 (Bricklayers) and Laborers Local 317 (Laborers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees they represent rather than to employees represented by Tile Finishers Local 47-T (Tile Finishers). The hearing was held on April 10, 11, 23, 24, and 29, 1991, before Hearing Officer Deborah K. Rogers.

The National Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer, Grazzini Brothers & Company, is a Minnesota corporation with its principal place of business located in Minneapolis, Minnesota, where it is engaged in contracting marble, tile, terrazzo, and ceramic tile work. During the past 12 months, a representative period, the Employer performed services valued in excess of $50,000 for customers located outside the State of Minnesota. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties stipulate, and we find, that the Bricklayers, Laborers, and Tile Finishers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

In December l990, the Employer was awarded a contract to install ceramic tile at the St. Croix Meadows Greyhound Racing Track project located in Hudson, Wisconsin. The Employer planned to staff this project, which was to begin on February 1, 1991, with one tile setter and one tile finisher from its regular crew in Minnesota represented by Bricklayers Local 18. As a result of changes in the timing requirements for commencing and completing the project, the Employer had to increase the size of its work force.

Various conversations occurred between representatives of the Employer and representatives of the Bricklayers, Laborers, and Tile Finishers, in January and February 1991, concerning claims for the finishing work. Tile Finishers filed a formal grievance against the Employer for violations of the ''current agreement'' in the course of its claim.[2] In response to the Employer's inquiries about using tile finishers on the project, the bricklayers and laborers, in mid-February, threatened to picket the jobsite if the Employer used tile finishers on the project.

On February 19, 1991, the Employer commenced working on the project with a crew of five journeymen and one apprentice tilesetter, a finisherbricklayer,[3] and two laborers. At various times thereafter, two finisher bricklayers, as well as two laborers, performed the finishing work.

B. *Work in Dispute*

The evidence indicates, and we find, that the disputed work is the finishing work associated with the ceramic tile installation on the St. Croix Meadows Greyhound Racing Track, located in Hudson, Wisconsin.[4]

C. *Contentions of the Parties*

The Employer contends that the dispute is properly before the Board for determination because there is reasonable cause to believe that Section 8(b)(4)(D) has been violated by threats to picket. On the merits the Employer contends that it is a member of the Tile Contractors Association of America (TCAA) and is bound by the National Agreement between the TCAA

[1] The original charge was filed on February 20, 1991, naming only the Bricklayers Local 19. An amended charge was filed on February 26, 1991, against the Bricklayers Local 19 and the Laborers Local 317. A second amended charge was filed, against the same two labor organizations on February 28, 1991.

[2] Whether the agreement had expired or was in effect at the time of these claims is in dispute. This case does not involve the application of *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787 (1990), which involved an attempt to enforce a signatory subcontracting clause.

[3] The tilesetters and the finisher bricklayer came from Minnesota out of Bricklayers Local 18, a Minnesota local. While working in the Eau Claire area, however, they did so as travelers subject to the jurisdiction of Bricklayers Local 19, a Wisconsin local. The laborers come from Laborers Local 317.

[4] The notice of hearing describes the disputed work as follows:

> Installation of ceramic tile on the St. Croix Meadows Greyhound Racing Track, located in Hudson, Wisconsin.

Although the parties did not stipulate to a description of the disputed work, all parties agreed that the actual tilesetting is properly performed by the Bricklayers. Further, the Tile Finishers only claims the finishing work. Finally, we note that the Bricklayers and the Laborers have an agreement to share the finishing work, which includes, inter alia, grouting, cleanup, and movement of materials on the jobsite.

and the International Bricklayers Union (BAC). In addition to relying on the collective-bargaining agreements and a project agreement it signed with the Laborers after this dispute arose, the Employer contends that the Bricklayers and Laborers should be awarded the disputed work on the basis of employer preference, economy and efficiency of operations, and area practice.

The Bricklayers and the Laborers filed a joint brief in which they contend that they share jurisdiction over the disputed work. They rely on grounds similar to those expressed by the Employer (except they do not appear to be urging the Laborers' project agreement as a basis on which to be awarded the work), and also on developments in the tile trade nationally.

The Tile Finishers contend that no reasonable cause exists for finding a jurisdictional dispute because the threats to picket resulted from collusion among the Employer, the Bricklayers, and the Laborers to obtain a 10(k) determination. On the merits, the Tile Finishers relies on employer past practice, industry practice, certain impartial dispute board determinations, and its alleged collective-bargaining agreement.

D. *Applicability of the Statute*

Before the Board proceeds with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that the Act has been violated. As described above, the record shows that the bricklayers and laborers both threatened to picket the jobsite if the Employer assigned members of the Tile Finishers to perform the disputed work.[5]

No party to this proceeding contends that there is an agreed-on voluntary method for resolving this dispute.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certifications and collective-bargaining agreements

There is no evidence that the Board has certified any of the three Unions as the exclusive collective-bargaining representative of the Employer's employees, and thus certification is not a factor favoring either group of employees. Similarly, for the reasons set forth below, ''collective-bargaining agreements'' also do not amount here to a factor on which we can rely in awarding the disputed work.

At the time the dispute arose, no collective-bargaining agreement existed between the Employer and the Laborers. Although the Employer subsequently signed an agreement with the Laborers that covered the instant project and future ones, that agreement was entered into after the Laborers threatened to picket in furtherance of its claim to a portion of the disputed work. Consequently, we place no reliance on the agreement. See *Electrical Workers IBEW Local 400 (E. T. Electrical)*, 285 NLRB 1149, 1151 (1987). Further, even if an agreement entered into under coercive circumstances were entitled to be given some weight, the Laborers' agreement conditioned its continued existence on the outcome of this proceeding. Obviously, we can give no weight here to an agreement whose very existence, is contingent on our determination of the dispute at issue.

With respect to the Tile Finishers, the existence of an agreement with the Employer is at best problematic. There is strong disagreement between that labor organization and the Employer over whether the latter, after May 31, 1990, was bound to adhere to the terms of an agreement between the Tile Finishers and the Madison Area Tile Contractor's Association (MATCA). They are agreed that, in 1987, in settlement of an unfair labor practice charge, the Employer signed the 1984–1987 Tile Finishers–MATCA contract. There also is no dispute between them that pursuant to the parties' ''Addendum,''[6] the Employer obligated itself for an additional 3 years to follow the ''same terms and conditions'' agreed to by the Tile Finishers and MATCA. Their disagreement centers on the nature and scope of the addendum. Thus, they disagree on whether the addendum is part of the 1987 settlement, as the

[5] The Tile Finishers contend that, as part of a conspiracy to produce threats, the Employer mentioned to the Bricklayers and the Laborers the possibility of using Tile Finishers. The Tile Finishers also implies that the Employer was not serious in suggesting that it might use its members. The Tile Finishers therefore claims that the situation was ''rigged'' to create a jurisdictional dispute under Sec. 8(b)(4)(D) of the Act. This is supposition; the Tile Finishers have presented no evidence to show collusion between the Employer and the other Unions.

[6] The addendum reads:

> The Employer agrees to be bound to the Agreement for an additional three (3) years (June 1, 1987 through May 31, 1990) with the same terms and conditions agreed to by the Union and the Madison Area Ceramic Tile Contractor's Association.

Tile Finishers contend,[7] or whether it relates back to the 1984–1987 agreement, as the Employer asserts.[8] More importantly, they urge different interpretations of the addendum that cannot be reconciled on the state of this record.

The Tile Finishers makes the following claims: that the addendum bound the Employer to the ''same terms and conditions'' of any MATCA contracts entered into within the addendum's June 1, 1987 to May 31, 1990 period, including an evergreen clause that automatically renewed the contract unless a timely cancellation notice was sent; that two such contracts were entered into with MATCA during the 1987–1990 period, the last of which was effective from June 1, 1988, through May 31, 1991;[9] and that this latter agreement applied for its full 3-year term ending May 31, 1991, because the Employer failed to send the appropriate termination notice, as required by the evergreen clause, before the 3-year period covered by the addendum expired on May 31, 1990. The Employer counters that these claims ignore the plain meaning of the addendum which, under the Employer's interpretation, limits its obligation to abide by the terms of a MATCA contract or contracts for the 3-year period set forth in the addendum. Thus, once that period ended on May 31, 1990, the obligation to adhere to the terms of the MATCA contract then in existence ended with it. The Employer further notes that the addendum contains no termination notice or renewal provisions, and that the evergreen clause in the 1989–1991 agreement that the Tile Finishers claims was binding on the Employer, would not have matured until after the 3-year period of the addendum had expired.

In light of the foregoing, we find that the status and meaning of the addendum are ambiguous and, thus, that no firm basis exists for finding that an agreement existed between the Employer and the Tile Finishers after May 31, 1990.

The existence of a current agreement between the Employer and the Bricklayers is also disputed and not free from doubt. Any such agreement depends on whether there is an effective national agreement between the TCAA and the BAC, an agreement to which the Employer would be bound by virtue of its membership in the TCAA and which would require it to apply local Bricklayers' agreements when performing work in various jurisdictions around the country, such as the area of Eau Claire, Wisconsin. The record shows that the last signed national agreement expired on December 31, 1989, more than 2 years before the instant work dispute arose, and that the TCAA sent timely notification to the BAC that it was reopening negotiations on that agreement, which otherwise would have automatically renewed.

The Employer and the Bricklayers concede that no new agreement had been entered into as of the 10(k) hearing and that negotiations were continuing on subcontracting and doublebreasting, the two issues on which they were at odds. Nevertheless, they claim that, in November 1990, the TCAA and the BAC orally agreed that, except for the articles relating to those two subjects, the 1989 agreement was still in effect and, hence, the other terms of that agreement applied to the Greyhound Track Project at all times material. The Tile Finishers argue, however, that the TCAA has never rescinded its termination of the last signed national agreement, and that its report to its member employers expressly contradicts the claim that the agreement was still in effect after January 1, 1990.[10] The report told TCAA members that effective January 1, 1990, they had no rights or obligations to their union employees based on the national agreement.

We do not find that a definite, stable current contractual relationship existed between the Employer and the Bricklayers when this dispute arose. There is no signed new agreement; the contracting parties did not extend the expired agreement upon its expiration on December 31, 1989; the terms of that agreement were not resurrected, with the two exceptions noted, until November 1990 (and then only by oral agreement between the two principal negotiators); and negotiations on a new agreement could founder at any time.

In any event, even assuming that the national agreement was in effect when the dispute arose, that agreement would not provide—in the absence of an uncoerced, timely, and firm concurrent agreement between the Laborers and the Employer—a sufficient contractual basis to support the Employer's assignment of the disputed work to a mixed crew of finisher bricklayers and laborers that reflects a coalition agreement between the two Unions that represent them.

Accordingly, we attach no weight to collective-bargaining agreements as a factor in awarding the work in dispute to either one of the competing groups of employees.

2. The Employer's assignment and preference

The Employer prefers to assign, and has assigned, the disputed work to employees represented by the Bricklayers and Laborers. This factor favors an assign-

[7] In support of this contention, the Tile Finishers primarily argue that it would not have made any sense for the addendum to be part of the 1984–1987 contract, because that agreement had expired before the settlement was signed.

[8] In furtherance of this assertion, the Employer notes that the addendum was prepared in 1986 by the Tile Finishers, and argues that if it were not an attachment to the 1984–1987 agreement there would have been no reason to sign that already expired contract or for the addendum to refer to it.

[9] The evidence shows that the Employer was not required to sign these contracts, and that it did not.

[10] Referred to erroneously, given the record evidence, as ''January 1, 1991,'' in the Tile Finishers' brief.

ment of the disputed work to the employees represented by the Bricklayers and the Laborers.

3. Employer past practice

Because the work is being done in Wisconsin, we shall focus on the Employer's practice of work assignments in that State, albeit the evidence concerning such assignments is limited.

The Tile Finishers claims that between 1978 and 1990 the Employer performed tile-contracting work in Wisconsin and was contractually obliged to use employees represented by it to do tile-finishing work, and that until the Dayton Hudson and Greyhound Track jobs—both of which were in the Eau Claire area—the Employer used ''Finishers to do tile finishing work in Wisconsin.'' In support of these claims, Tile Finishers Representative Judziewicz cited jobs in Sparta and Roberts, Wisconsin, both of which jobs were done in 1990. However, there were two projects on which the Employer Grazzini did not abide by these contractual obligations. One was the La Crosse area Valley View Mall project, and the other was the redoing of the Clark County home project. Further, the Employer presented evidence that it has, at least recently, used BAC-represented finishers, as well as those who are members of the Tile Finishers, on jobs in Wisconsin other than the one that has given rise to this jurisdictional dispute; and the Bricklayers and Laborers jointly point to evidence of BAC-represented finishers employed by the Employer on two Eau Claire area jobs, besides the one involved in this case. Accordingly, we find that the Employer's past practice in Wisconsin is unsettled and thus this factor favors neither of the competing employee groups.

4. Area practice

Representatives of the Bricklayers, the Laborers, and the Eau Claire area building trades all testified that finishing work has been awarded exclusively to employees represented by the Bricklayers and Laborers in the Eau Claire area.[11] These assignments are substantially a result of the virtual monopoly of the area market by the area's major tile contractor, Eau Claire Tile and Terrazzo Company, which has a local understanding with these two Unions.

The Tile Finishers appear to concede that the current area practice favors the Bricklayers and Laborers. Nevertheless, it points out that it had previously performed finishing work in the Eau Claire area and it attempts to expand the area by citing the Employer's operation throughout Wisconsin. Even in this expanded area, however, the Tile Finishers do not claim a preponderance of this work.

We find that this factor favors an award to employees represented by the Bricklayers and Laborers.

5. Industry practice

The Tile Finishers argues that tile contracts throughout the United States have observed jurisdictional lines as regards tile finishers and tile setters, and that the TCAA in general continues to respect the longstanding jurisdictional practice recognizing tile finishing work for employees represented by the Tile Finishers and tile setting work for employees represented by the Bricklayers. It acknowledges, however, that since the merger of the Tile Finishers with the Carpenters in late 1988, disputes have arisen between the Tile Finishers and the Bricklayers over the assignment of the tile finishing work. The Bricklayers and Laborers jointly contend that in the last 7 years the Bricklayers have gained ascendancy over the Tile Finishers as the union representing tile finishers and performing tile-finishing work in the United States and Canada. They further contend that technological change in the tile trade has significantly altered the relationship between tile setting and tile finishing so that the ratio between tilesetters and tile finishers has gone from one to one, to as high as three or four to one in favor of the former. As a result, they assert, tile finishers have joined Bricklayers apprenticeship programs to progress to tilesetters, and in the process the Bricklayers have replaced the tile finishers as the preeminent union representing the tile finishers.

We find that industry practice is mixed and thus, as a factor, favors neither of the competing employee groups.

6. Relative skills

Although the parties make claims disputing the adequacy of the skills of various individual employees, and concerning the quality of the Clark County Home job performed by the Tile Finishers, it has not been established that either the Tile Finishers or the Bricklayers/Laborers coalition could not supply the necessary number of employees possessing adequate skills to perform the work in dispute.[12] Accordingly, we find that this factor favors neither of the competing groups of employees.

7. Economy and efficiency of operations

The Employer contends that a number of factors make it more economical and efficient to use employees represented by the Bricklayers and the Laborers. The primary factor emphasized by the Employer's evi-

[11] The disputed work is located within the 14-county area served by the Building Trades Council of Eau Claire, Wisconsin.

[12] We note that there was testimony to the effect that there are a limited number of experienced laborers within the geographic area of the jobsite. While the number of such employees may be small, we also note that on the job in question no more than two laborers were required at any one time to supplement the bricklayers.

dence was the manpower ratio provisions present in the Tile Finishers' contract, but not in the Bricklayers' or Laborers' contracts, and the flexibility in scheduling and costs that this afforded it.[13] Thus, the Tile Finishers' contract requires a contractor to maintain a certain ratio of tile finishers to tilesetters. Various witnesses offered opinions concerning the percentages of each type of work required on a job and on the changing nature of the industry, including a decline in the percentage of finishing work which further undermines the use of fixed ratios to achieve efficient operations. The Employer showed that it used approximately 607 tilesetting hours but only 186 tile-finishing hours at the site of the disputed work using its combined crew of bricklayers and laborers. In contrast, the Tile Finishers' representative testified that, if there were 615 tile-setting hours, the Tile Finishers' contract would require 500 tile-finishing hours if that were the only project completed in the contract year.

The Employer also cited the more flexible hours that the Laborers' contract provides for a workday of 6 a.m. to 6 p.m. (the Tile Finishers' is 8 a.m. to 5 a.m.), available local personnel (no employees represented by the Tile Finishers are located in the Eau Claire 14-county area), and the fact that the Laborers' contract, but not that of the Tile Finishers,' allows for use of motorized vehicles by covered employees to transport materials on the jobsite.

The Tile Finishers disputed certain of this evidence and offered testimony that it was the Employer's frustration with the Tile Finishers' effective enforcement of its contract, rather than efficiency and economy of operations, that motivated the Employer's assignment of the work. In assessing the merits of competing claims under this factor, however, we look only to evidence that shows which employee group likely will most efficiently perform the disputed work, rather than which group the Employer prefers or the Employer's motivation in assigning the disputed work.

[13] Our reliance on the different union contracts in this section of our determination represents nothing more than recognition of certain contractual terms that would be imposed on the Employer under the three union contracts if they were in place and given effect.

Accordingly, having considered the evidence presented concerning efficiency and economy, we find that this factor favors an award to the mixed crew represented by the Bricklayers and Laborers.

8. Impartial jurisdictional dispute Board determinations

In support of its claim for the disputed work, the Tile Finishers rely on a series of awards by the Impartial Jurisdictional Disputes Board for the AFL–CIO during the period 1970–1980. The Bricklayers contend that these awards are irrelevant citing, inter alia, the absence of any awards since 1980 as well as the dramatic changes in the tile trade since 1980 that have increased the ratio of setters to finishers, with a corresponding rise in the preeminence of the Bricklayers. We find that this factor favors none of the respective competing groups of employees.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Bricklayers Local 19 and Laborers Local 317 are entitled to perform the work in dispute. We reach this conclusion relying on Employer preference, area practice, and economy and efficiency.

In making this determination, we are awarding the work to employees represented by General Laborers Union, Local 317 and Bricklayers and Allied Craftsmen, Local 19 of Wisconsin, not to those Unions or their members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees represented by General Laborers Union, Local 317 and Bricklayers and Allied Craftsmen, Local 19 of Wisconsin, are entitled to perform that portion of the installation of ceramic tile which does not involve setting tile on the St. Croix Meadows Greyhound Racing Track, located in Hudson, Wisconsin.